IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, *Petitioner*,

v.

FRANKLIN JONES, Commissioner of the Bureau of Revenue of the State of New Mexico, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*.

BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE

Petitioner and Respondents have filed with the Clerk of this Court a written stipulation consenting to the filing of this brief. *Amicus* has a considerable interest in the outcome of this case and is particularly qualified in the specialized area of Indian law.

Native American Rights Fund (hereinafter referred to as the "Fund") is a private, nonprofit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise on Indian law, the Fund also provides counsel to legal services programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund participates as *amicus curiae* in this case because of the impact the decision in this case will have on the present and future economic development of Indian tribes throughout the country.

STATEMENT

The Petitioner in this case is the Mescalero Apache Tribe. In 1852 the United States carved out of the Tribe's aboriginal homelands a reservation, and by treaty, the Tribe accepted the reservation, and ceded to the United States the remainder of its traditional lands. The reservation is now contained in Lincoln and Otero Counties of the State of New Mexico.

On June 18, 1934 Congress passed the Wheeler-Howard Act (48 Stat. 984, 25 U.S.C. 461, *et seq.*). Pursuant to this Act, specifically 25 U.S.C. § 476 the Tribe adopted a constitution in 1936 and was issued a corporate charter by the United States under 25 U.S.C. § 477. As required by 25 U.S.C. § 476, the Tribal constitution and amendments thereto have been approved by the Secretary of Interior. The Tribe continues to operate as a governmental body under this constitution and charter.

Over the last several years the Mescalero Apache Tribe has attempted to develop the reservation and lands near the reservation for the economic betterment of all members of the Tribe. As a part of this economic development, the Tribe leased from the United States Forest Service 80 acres of national forest lands bordering in part on the Tribe's reservation. On this land the Tribe owns and operates a ski resort, the Sierra Blanca Ski Enterprises. Some of the resort's cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation.

The involvement of the United States in this Tribal operation has been continuous and supportive. First a feasibility study was made and financed by the Bureau of Indian Affairs of the Department of Interior. The rental under the lease, the price of the equipment and the construction of the resort were all financed with money loaned to the Tribe by the United States under the authority of 25 U.S.C. § 470. Pursuant to the expansive regulations applicable to 25 U.S.C. § 470 loans, contained in 25 C.F.R. Part 91, approval of the Bureau of Indian Affairs is required in several areas of the operation of the ski resort. For example, the approval of this Bureau must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

The revenue generated by this ski resort is used and will continue to be used for the educational, social and economic welfare of the Mescalero Apache people. The ski resort also provides a job training center for the Tribe and approximately 20 to 30 Tribal members are employed at the ski resort in a job training capacity.

In May, 1968 the Bureau of Revenue of the State of New Mexico audited the ski resort. As a result of this audit, the State of New Mexico assessed the Tribe for a tax on its storage, use or other consumption in New Mexico of the materials owned by the Tribe and used to construct two ski lifts at the resort, pursuant to § 72-17-3 N.M.S.A. 1953 Comp. These materials for which the Tribe was assessed had all been purchased from the funds supplied to the Tribe by the United States pursuant to 25 U.S.C. § 470. The Tribe protested this assessment.

The Tribe reported and paid to the New Mexico Bureau of Revenue a tax on the gross receipts of its ski resort enterprise pursuant to the provisions of the Emergency School Tax Act, as amended, §§ 72-16-1 through 72-16-47 N.M.S.A. 1953 Comp. Subsequent to payment the Tribe filed a claim with the Respondent for a refund of this gross receipts tax.

The protest and claim for refund were denied by a Decision and Order of the Commissioner of the Bureau of Revenue, Respondent, dated December 23, 1970. The matter was appealed to the Court of Appeals of the State of New Mexico. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of Revenue, by a Court divided on rationale. A timely Motion for Re-Hearing was filed and an Order denying the Motion for Rehearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 28, 1971, and an order denying the Petition for Writ of Certiorari was entered on October 6, 1971.

This Court granted Petitioner's Petition for a Writ of Certiorari on April 24, 1972.

ARGUMENT

This case presents this Court the opportunity to determine if a state, here New Mexico, can constitutionally tax an Indian Tribe, chartered by the United States and pursuing profit-making activities under the watchful eye and regulatory control of the United States, its legal trustee and guardian. The petitioner herein, the Mescalero Apache Tribe, has undertaken an economic development program to provide funds for the educational, social and further economic development of the Tribe as a whole. All of the profits generated by this particular phase of the development program, a ski resort located off the reservation, are being invested in those social services, such as education, which the federal government is bound by treaty and law to provide as a part of the trust obligation of the United States to the Mescalero Apache Indians.

Hence, a successful and profitable operation of the facilities being taxed by New Mexico immediately relieves the Federal government of some financial burdens. The United States recognized the benefits it would receive, and consequently provided technical assistance, loans, and supervision of this tribal project which the State of New Mexico is now attempting to tax.

The economic viability of the development programs now being undertaken or contemplated for the future by the Petitioner and other tribes is potentially threatened by the taxing power of the states in which the reservations are situated. This Court in 1819 first recognized in the case of *M'Culloch* v. *Maryland*[1] that the power of a state to tax a federal instrumentality is incompatible with a federal system of government. This Court in this case must decide the vitality today of this long established doctrine.

The Petitioner before this Court deviated from the economic development programs of most tribes today in that the Mescalero Apache Tribe recognized the economic potential of lands belonging to the United States and bordering its reservation. The Tribe leased these lands from the United States and constructed thereon the ski resort with money borrowed from the United States.

Amicus maintains that the nature of the relationship of the Petitioner Tribe to the United States is unaffected by where that Tribe chooses to conduct its business. Until the termination of the Federal trust responsibility of the United States to the Mescalero Apache Tribe, that Tribe will remain an instrumen-

[1] 17 U.S. (4 Wheat.) 316, 427 (1819).

tality of the Federal government, and its activities will be sheltered from state taxation by the legal umbrella of protection which the United States Constitution affords the Federal government and its instrumentalities.

I

THE MESCALERO APACHE TRIBE IS A FEDERAL INSTRUMENTALITY AND, AS SUCH, IS EXEMPT FROM STATE TAXATION.

A. The Mescalero Apache Tribe Is a Federal Instrumentality

In 1934, Congress passed the Act of June 18, 1934,[3] commonly referred to as the Wheeler-Howard Act. The Senate committee reporting out the bill favorably stated the intent of this bill succinctly:

> (1) To stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
>
> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.
>
> (3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.
>
> (5) To establish a system of financial credit for Indians.

[3] 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*

(6) To supply Indians with means for collegiate and technical training in the best schools.

(7) To open the way for qualified Indians to hold positions in the Federal Indian Service.[3]

Pursuant to this legislation, in 1936 the Mescalero Apache Tribe adopted a Constitution which was approved by the Secretary of Interior, pursuant to 25 U.S.C. § 476, and the Tribe commenced operation as an incorporated organization, chartered by the United States under the authority of 25 U.S.C. § 477. To be noted also, the Tribal enterprise that New Mexico is now taxing was financed by loans from the United States under 25 U.S.C. § 470, which is a provision of the Wheeler-Howard Act, designed to accomplish the 4th and 5th objective of the Act, as outlined *supra*.

Amicus contends that since the Petitioner is chartered by the United States and is pursuing activity sponsored by the United States, the Tribe is a Federal instrumentality. A recent series of decisions by this Court support this proposition. In *Federal Land Bank* v. *Bismarck Lumber Company*[4] this Court decided that a Federally chartered land bank was a Federal instrumentality and hence was exempt from a state sales tax. This Court used the following language: "When Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[5]

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[3] Sen. Rept. No. 1080, 73rd Congress, 2nd Session (May 10 [Calendar Day, May 22] 1934).

[4] 314 U.S. 95 (1941).

[5] 314 U.S. 95 at 102.

Even more recently, this Court has denominated a variety of entities furthering the interests of the Federal government as Federal instrumentalities for tax purposes. In *First Agricultural National Bank of Berkshire Co.* v. *State Tax Commission*[6] this Court in 1968 concluded that a national bank is a Federal instrumentality and in the absence of authorizing Congressional legislation, exempt from a state sales tax on tangible personal property purchased for the bank. See also *Standard Oil Co. of California* v. *Johnson*[7] (post exchanges on military bases are Federal instrumentalities); *Pittman* v. *Home Owners' Loan Corp.*[8] (Federally sponsored Home Owners' Loan Corporations are Federal instrumentalities).

In *Department of Employment* v. *United States*,[9] this Court deemed the Red Cross such an instrumentality, and therefore exempt from a state unemployment compensation tax. This Court noted that the Red Cross was chartered by the United States, was subject to governmental supervision and to regular financial audit by the Defense Department, that some of the officers of the Red Cross are appointed by the President, that the Red Cross is satisfying some obligations of the Federal government, and is otherwise furthering objectives of the United States.[10]

Employing the above, most recently delimited, tests set down by this Court for what constitutes a Federal

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[6] 392 U.S. 339 (1968).

[7] 316 U.S. 481 (1942).

[8] 308 U.S. 21 (1939).

[9] 385 U.S. 355 (1966).

[10] 385 U.S. 355, at 359.

instrumentality, the Petitioner is clearly such an instrumentality. The Tribe is Federally chartered and under the close scrutiny of the United States; its Constitution was approved by the United States, and all amendments thereto, as well as most Tribal lawmaking, are subject to approval by the Department of Interior. When pursuing those business activities now being taxed, the Tribe comes under further regulations because of the borrowing of funds from the United States under 25 U.S.C. § 470.[11] That the Tribe is satisfying the obligations of the United States can best be witnessed by the uses to which the Tribe is dedicating the profits of this ski resort—the economic, education and social programs designed to benefit the Tribal members, which programs the Federal government would otherwise be obligated to provide, by treaty and law, as a part of the trust obligation of the United States. Finally, this Court in 1903 recognized in *United States* v. *Rickert*[12] that economically viable Indian communities were a fundamental policy objective of the United States in carving out reservations for the various Indian tribes. In that case, this Court struck down a tax on permanent improvements made on reservation lands recognizing that these improvements were essential for the development of the Indian owners. Certainly the Federal objective of tribal economic development is no less strong today. President Nixon deemed such development a goal of his administration in the following language: "It is critically important that the Federal government support and

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[11] 25 C.F.R. Part 91.

[12] 188 U.S. 432 (1903).

encourage efforts which help Indians develop their own economic infrastructure." [13]

B. As a Federal Instrumentality, the Mescalero Apache Tribe Is Exempt From State Taxation

Without exception, this Court has held that an entity which legally is a Federal instrumentality is necessarily exempt from state taxation, unless Congress expressly directs otherwise.[14] This proposition was originally expounded in *M'Culloch* v. *Maryland* [15] as a necessary response to the notion that the power to tax is the power to destroy, and that instruments of the Federal government in a federal system could not be subject to a destructive power exercisable by a state. "... [S]ince 1819, when Chief Justice Marshall in the *M'Culloch* case expounded the principle that properties, functions and instrumentalities of the Federal government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application." [16] In a 1968 case previously mentioned, *First Agricultural National Bank of Berkshire Co.* v. *State Tax*

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[13] "Indian Affairs", The President's Message to The Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970).

[14] *Amicus* does not contend that the doctrine of immunity from state taxation for entities asserting the protection of the Federal government's exemption has not undergone change since *M'Culloch* v. *Maryland* in 1819. This Court has modified and refined the criteria for qualifying as a Federal instrumentality over the years. But never has this Court allowed a state to tax an entity this Court concludes is an instrumentality without a congressional waiver of the immunity from state taxation.

[15] 17 U.S. (4 Wheat.) 316 (1819).

[16] *U.S.* v. *County of Allegheny*, 322 U.S. 174 at 176 (1944); *see* also, all cases cited in Part A, *supra*.

Commission[17] this Court struck down a state sales tax on tangible personal property purchased by a national bank because that tax was not one authorized by Congress. *Amicus* urges this Court continue the vitality of the *M'Culloch* doctrine in the instant case, since exactly the fears which moved Mr. Justice Marshall in *M'Culloch* are compelling in this case. The benefits which the Mescalero Apache Tribe, a federal instrumentality, may gain from its ski resort enterprise will decrease or disappear entirely if the State of New Mexico is allowed to assess the taxes against the Tribe which are herein challenged.

II

THE NEW MEXICO ENABLING ACT DOES NOT PERMIT NEW MEXICO TO LEVY TAXES AGAINST THE MESCALERO APACHE TRIBE.

The New Mexico Enabling Act,[18] Section 2, Second Clause, prohibits the state from taxing "lands or property" belonging to the United States or hereafter "acquired by the United States or reserved for its use." The Act further provides that nothing therein "shall preclude the said state from taxing, as other lands and other property are taxed, any land and other property outside of an Indian Reservation owned or held by any Indian save and except such lands . . . as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe."[19]

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[17] 392 U.S. 339 (1968).

[18] 36 Stat. 557 (1910).

[19] 36 Stat. 557, 558-559.

As stated *supra*, the enterprise being taxed by New Mexico is not situated on the Mescalero Apache Reservation. Respondent would have this Court interpret the above quoted sections of the New Mexico Enabling Act as allowing the taxes in question herein. *Amicus* contends that such a reading is incorrect for the following reasons:

First, the Enabling Act prohibits the taxation of lands or property "acquired by the United States or reserved for its use." If this Court concludes that the Mescalero Apache Tribe is a Federal instrumentality, as *Amicus* argues, then all of the property owned by the Tribe without the boundaries of the reservation are reserved for the use of the United States. To be a Federal instrumentality is to stand in the shoes of the United States.

Secondly, the Enabling Act does give the State of New Mexico the power to tax lands and other property owned by "any Indian or Indians" outside the reservations. Noticeably absent is the power to tax lands or property not located on a reservation and owned by *Indian Tribes*.

Amicus suggests that the omission of Indian Tribes from the grant of taxing power to New Mexico was not inadvertent but instead supports the proposition that Indian Tribes have always been considered Federal instrumentalities by Congress, and their activity, within or without the reservation should consequently be immune from New Mexico's taxing power. The fact that the New Mexico Enabling Act (1910) predates the Act of June 18, 1934 (the Wheeler-Howard Act, 1934) does not vitiate this argument. Indian tribes had been recognized as distinct legal entities in law ever since Chief Justice Marshall, in *The Cherokee*

Nation v. *Georgia*,"[30] denominated Indian tribes in the United States as "domestic dependent nations."[31] New Mexico itself in its territorial laws acknowledged Indian tribes within the territorial boundaries as corporate bodies, capable of suing or defending suits.[32] Had Congress intended to allow New Mexico to tax the property and activities of Indian tribes, such as the Petitioner, located without the reservation, Congress could have specifically referred to Indian tribes when authorizing New Mexico to tax "lands or property outside of an Indian reservation owned or held by any Indian." By not so referring to Indian tribes, Congress intended that their activity, within or without the reservation, should not be taxed.

III

25 U.S.C. § 465 PRECLUDES NEW MEXICO FROM TAXING PROPERTY OR ENTERPRISES OWNED BY THE MESCALERO APACHE TRIBE AND SITUATED ON LANDS LEASED WITH FUNDS PROVIDED UNDER 25 U.S.C. § 470.

25 U.S.C. § 465 states that: "Title to any land or rights acquired pursuant to sections .... 465, 466-470 ... of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from state and local taxation." *Amicus* argues that because the Tribe leased the land on which the ski resort is located from the United States Forest Service with money provided pursuant to 25 U.S.C. § 470, New Mexico may not tax in any

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[30] 30 U.S. (5 Peters) 1 (1831).

[31] 30 U.S. (5 Peters) 1 at 16.

[32] New Mexico Laws 1851-1852, pp. 176, 418; *cf. Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

way property purchased by the Tribe with a 25 U.S.C. § 470 loan and located on these leased lands.

Certainly, New Mexico could not assess a property tax on the leased lands because of the specific exclusion in 25 U.S.C. § 465 for lands or rights acquired pursuant to 25 U.S.C. § 470. But because Congress provided no specific exclusion for permanent improvements owned by Tribes and located on leased lands, the inference might be drawn that New Mexico may tax such property. Such an inference would be incorrect because when 25 U.S.C. §§ 465 and 470 were enacted in 1934 as part of the Act of June 18, 1934 [23] (the Wheeler-Howard Act), the operative case law established a tax exemption for any and all property located on tax exempt reservation land. In *United States* v. *Rickert* [24] this Court in 1903 struck down a tax levied by South Dakota on the permanent improvements owned by Indians and located on tax exempt land. This Court stated that "[e]very reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." [25] The above quoted reasoning in *Rickert* is particularly compelling when the permanent improvements being taxed were bought with money loaned by the United States specifically for the economic development of the Tribe. *Amicus* suggests that Congress, in passing the Wheeler-Howard Act in 1934, legislated into the well-established case law represented by *U. S.* v. *Rickert* that permanent improvements owned by Indians and located on tax exempt lands were not taxable.

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[23] 48 Stat. 984; 25 U.S.C. §§ 461 *et seq.*

[24] 188 U.S. 432 (1903).

[25] 188 U.S. 432 at 442.

CONCLUSION

For the above reasons, *Amicus*, Native American Rights Fund, urges this Court to reverse the decision rendered against the Petitioner by the Court of Appeals of the State of New Mexico. We urge this Court find that the Petitioner, Mescalero Apache Tribe, is a Federal instrumentality and therefore that its activities are protected from the taxes assessed against it by the State of New Mexico. Such a finding comports with the language and intent of the New Mexico Enabling Act and is supported by 25 U.S.C. §§ 465, 470.

Respectfully submitted,

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